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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91208325
Party	Plaintiff VIRGIN ENTERPRISES LIMITED
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re Application No. 85/489,294
Filed: December 7, 2011
Mark: VIRGIN CHOCOLATE
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VIRGIN ENTERPRISES LIMITED, Opposer, v. RAAKA CHOCOLATE, INC., Applicant.	Opposition No. 91208325

OPPOSER'S RESPONSE TO APPLICANT'S
MOTION TO DISMISS

VIRGIN ENTERPRISES LIMITED ("Virgin" or "Opposer"), through its undersigned counsel, submits the following response to Applicant Raaka Chocolate, Inc.'s ("Applicant") motion to dismiss Virgin's Notice of Opposition ("Motion to Dismiss").

I. Introduction

In its Notice of Opposition, Virgin alleged facts sufficient to provide Applicant with proper notice of Virgin's claims, including: (1) Virgin is the owner of prior registrations and applications for VIRGIN and VIRGIN-formative marks in connection with related goods and services and has used the VIRGIN mark in U.S. commerce in connection with chocolate, hot chocolate and other related goods (collectively, the "VIRGIN Marks"); (2) it believes it will be damaged by the registration of Applicant's VIRGIN CHOCOLATE mark (the "Mark"); and (3) Sections 2(d) and 43(c) of the Lanham Act

form valid bases for refusal of the registration of Applicant's Mark. *See* 15 U.S.C. §§ 1052(d); 1125(c).

Applicant argues in its Motion to Dismiss that Virgin was required to allege specific "factual" and "substantive" allegations regarding the basis for its claims, despite the Board's notice pleading standard that only requires an opposer to allege enough facts to give the applicant notice of its claims. Further, Applicant contends that there can be no likelihood of confusion because Virgin does not own a federal registration in International Class 30 even though the Federal Circuit and the Trademark Trial and Appeal Board (the "Board") have repeatedly held that classification is irrelevant to the issue of registrability. Last, Applicant wrongly argues that Virgin failed to allege that Applicant intended to create or created an association with Virgin when the allegation was, in fact, pled in the Notice of Opposition.

In sum, Applicant's claims lack any factual or legal support, and therefore, Virgin respectfully requests that the Board deny Applicant's Motion to Dismiss in its entirety.

II. Legal Standard

To overcome Applicant's Motion to Dismiss, Virgin need only allege such facts as would, if proved, establish that: (1) Virgin has standing to maintain the proceeding, and (2) a valid ground exists for opposing the mark. *Fair Indigo LLC v. Style Conscience*, 2007 WL 4162785 (T.T.A.B. Nov. 21, 2007). In reviewing Applicant's Motion to Dismiss, the Board must construe the allegations contained in Virgin's Notice of Opposition liberally, accept as true all well-pled and material allegations of the complaint and construe the complaint in favor of the complaining party. *See* TBMP § 503.02

(stating that the Board must examine the complaint in its entirety, construing the allegations so as to do justice).

III. Argument

A. Applicant Has Sufficient Notice Of The Basis For Virgin's Claims

Applicant first contends that Virgin's Notice of Opposition failed to provide specific factual and substantive allegations regarding how the VIRGIN Marks are used in connection with chocolate. *See* Applicant's Motion to Dismiss, p.2. However, the Board does not require that Virgin set forth detailed factual allegations. *Zoba Int'l Corp. dba CD Digital Card v. DVD Format/Logo Licensing Corp.*, 2011 WL 1060727, *1 (T.T.A.B. March 10, 2011) (stating that "the plausibility standard does not require that a plaintiff set forth detailed factual allegations"). Instead, Virgin must allege "'enough factual matter … to suggest that [a claim is plausible]' and 'raise a right to relief above the speculative level.'" *Id.*; *see also* TBMP § 503.02 ("To survive a motion to dismiss, a complaint must 'state a claim to relief that is plausible on its face.'").

Here, Virgin has met its burden under the notice pleading standard. First, Virgin properly pled that it owns prior registrations and applications for the VIRGIN Marks and has used its Marks in connection with related goods and services, including the retail sale and distribution of chocolate and hot chocolate. S*ee* Virgin's Notice of Opposition, ¶¶ 2, 21, 27, 32; *see also Cunningham v. Laser Golf Corp.*, 222 F.3d 943 (Fed. Cir. 2000) (holding that plaintiff's two prior registrations for LASER were sufficient to establish standing against junior user's LASERSWING mark). As a result, Virgin believes it is likely to be damaged by the registration of Applicant's mark.

Second, Virgin alleged proper grounds that form the basis for the refusal of registration of Applicant's Mark, namely, likelihood of confusion under Section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d), and dilution under Section 43(c) of the Lanham Act, 15 U.S.C. § 1125(c). *See* Virgin's Notice of Opposition, ¶¶ 29, 33; *see also* TBMP § 309.03(c) ("A plaintiff may raise any available statutory grounds for opposition … that negates the defendant's right to registration.").

Accordingly, Virgin respectfully requests that the Board dismiss Applicant's first argument in its Motion to Dismiss.

B. The Board Has Repeatedly Held That Classification Is Irrelevant To The Issue Of Registrability

Next, Applicant contends that there can be no likelihood of confusion because Virgin does not own a trademark registration in Class 30. *See* Applicant's Motion to Dismiss, p.2. Applicant's argument, however, overlooks binding precedent stating that "classification is wholly irrelevant to the issue of registrability." *Jean Patou, Inc. v. Theon, Inc.*, 9 F.3d 971, 975 (Fed. Cir. 1993). Moreover, Virgin specifically alleged that it has used the VIRGIN Marks on and in association with the retail sale or distribution of chocolate, hot chocolate and other related goods. *See* Virgin's Notice of Opposition, ¶ 2. Accepting these well-pled allegations as true, as required under FRCP 8 and TBMP § 503.02, Virgin has pled sufficient grounds for opposing Applicant's mark.

Applicant also cites the non-precedential case of *Virgin Enterprises Ltd. v. Steven E. Moore*, in which the Board dismissed Virgin's opposition to the applicant's VIRGINFARMS mark. 2012 WL 3992908 (T.T.A.B. Aug. 31, 2012) (hereinafter the "*VirginFarms* case"). However, this case is readily distinguishable because: (1) the

VirginFarms case did not arise in the context of a motion to dismiss;[1] and (2) the Board excluded evidence submitted by Virgin in its notice of reliance that was critical to its case. Consequently, Applicant's reliance on this non-precedential decision is misplaced and does not support its argument.

Therefore, Virgin submits that Applicant's second argument is also wholly without merit.

C. Virgin Did, In Fact, Allege That Applicant Intended To Create Or Created An Association With Virgin

Finally, Applicant asserts that Virgin failed to allege in its Notice of Opposition that "Raaka either has created or intended to create an association with Opposer or its VIRGIN mark." Applicant's Motion to Dismiss, p. 4. However, ¶ 27 of Virgin's Notice of Opposition states that Applicant created or intended to create an association with Virgin. Because Applicant's argument is unsupported by the facts, Virgin requests that the Board disregard this argument.

III. Conclusion

For the reasons set forth above, Virgin respectfully requests that the Board deny Applicant's Motion to Dismiss and order Applicant to answer Virgin's Notice of Opposition.

[1] Virgin also notes that the Board did, in fact, find that the VIRGIN mark was "famous for purposes of likelihood of confusion for a wide variety of consumer goods and services in the entertainment, telecommunications, transportation and travel fields." 2012 WL 3992908 at *9.

Respectfully submitted,

Dated: March 5, 2013

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing OPPOSER'S RESPONSE TO APPLICANT'S MOTION TO DISMISS has been served upon Raaka Chocolate, Inc., via first class mail, postage prepaid, addressed as follows:

RYAN CHENEY
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Dated: March 5, 2013

By: Craig Beaker
Craig A. Beaker